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SUPREME COURT, U.S.

IN THE UNITED STATES SUPREME COURT

GRANITE STATE OUTDOOR ADVERTISING, INC.,

Petitioner,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

From the outset of its Brief in Opposition, the Respondent creatively attempts to obscure and undermine the importance of the question presented by Petitioner. Rather than take on the crux of the issue presented by Granite State, namely whether overbreadth standing no longer operates to allow an applicant for a sign to facially challenge the lack of procedural safeguards in a sign permitting regulation, Respondent sidesteps the issue almost completely, choosing instead to focus on its theory that the overbreadth doctrine has never allowed a facial challenge to a law unless the litigant has suffered an injury-in-fact under the particular provision that it seeks to challenge. *See* Brief in Opp., p. i. However, as this Court has consistently allowed litigants to challenge the lack of procedural safeguards in prior restraints, the Eleventh Circuit's departure from this body of law presents a matter of great importance.

I. THIS COURT HAS ROUTINELY ALLOWED FACIAL CHALLENGES TO LICENSING SCHEMES IN SITUATIONS WHERE THE USE IN QUESTION WAS PROHIBITED.

In an effort to diminish the difference between the approach adopted by the Eleventh Circuit with respect to facial challenges in *Granite State Outdoor Advertising, Inc. v. City of Fort Lauderdale*, 2006 WL 2560679 (11th Cir. Sept. 6, 2006), and the approach taken by other circuits, Respondent asserts that decisions like *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005), and *Lamar Advertising of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004), are distinguishable in part because the underlying use at issue in those cases was permitted, whereas here, the use sought by Granite State was purportedly banned. *See* Brief in Opp., pp. 20-24. Such an argument is undermined by the fact that this Court has specifically entertained facial challenges to permitting schemes where the

proposed use was banned. E.g., *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219 (2004); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990).

In *FW/PBS*, for example, this Court considered a litigant's challenge to an adult entertainment ordinance. Before the trial court, the plaintiffs challenged the constitutionality of a new ordinance which rendered their existing stores nonconforming and required that they be closed within three years. *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1067 (N.D. Tex. 1986). Even though the existing businesses already had licenses, the lower court permitted them to challenge the licensing scheme of the new ordinance, holding "[i]t is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought." *Id.* After the bulk of the ordinance was upheld, including the licensing scheme, the plaintiffs appealed. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). On appeal, the Fifth Circuit found that the licensing scheme used by the city satisfied constitutional standards. *Id.* at 1301-04.

On appeal to this Court, the petitioners were afforded standing to challenge the licensing scheme. 493 U.S. at 223-30, 110 S. Ct. at 603-07. After finding that the plaintiffs had standing, this Court found that the licensing scheme was unconstitutional because it lacked the necessary procedural safeguards. *Id.* Even though the continued operation of the adult establishments was expressly prohibited, this Court permitted the petitioners to challenge the licensing scheme. *Id.* In contrast, the approach adopted by the Eleventh Circuit below would have dictated that the case be dismissed for lack of standing because the proposed use was not permitted. (App. 6a-7a). Thus, *FW/PBS* shows that Granite State should have been afforded standing to challenge the licensing provisions of the Ft. Lauderdale sign code.

This Court's decision in *Littleton* is in accord. In *Littleton*, the Court addressed the constitutionality of an adult business ordinance. 541 U.S. at 776-77, 124 S. Ct. at 2221-

22. The respondent in *Littleton* had opened up an adult bookstore in a location where the city expressly prohibited such a business. 541 U.S. at 777, 124 S. Ct. at 2222. Even though the bookstore was properly banned in that location, the Tenth Circuit found that the respondent had standing to challenge the licensing provisions of the ordinance. 311 F. 3d at 1226-27. After the Tenth Circuit found the permitting requirements facially unconstitutional, the city appealed to this Court. 541 U.S. at 778, 124 S. Ct. at 2222.

Although this Court reversed the decision of the Tenth Circuit and found that the ordinance did indeed provide for a prompt judicial determination, in doing so, the Court permitted the plaintiff standing to facially challenge the judicial review provisions even though the plaintiff never attempted to obtain judicial review of the city's citation. 541 U.S. at 777-78, 782-84, 124 S. Ct. at 2222, 2225-26. As *Littleton* makes clear, plaintiffs who suffer any harm under a regulation can facially challenge *invalid procedural provisions* that are alleged to be overbroad in their application. As the approach adopted by the Eleventh Circuit is inconsistent with *Littleton*, this petition should be granted.[1]

Given that this Court has expressly afforded a litigant standing to facially challenge a licensing scheme in instances where the underlying use was prohibited, Respondent's attempt to distinguish the case law relied upon by Petitioner in its opening brief on this ground is unpersuasive.

Equally as unpersuasive is Respondent's attempt to distinguish the Sixth Circuit's opinion in *R.S.W.W.* by citing that circuit's recent opinion in *Prime Media, Inc. v. City of*

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[1] Respondent's attempt to rely on *Littleton* for the premise that individuals who are denied a license are free to bring as-applied challenges is misplaced. *See* Response in Opposition, p. 14. This Court was simply noting that while the licensing scheme at issue provided sufficient procedural safeguards on its face, special problems of undue delay with respect to the licensing scheme could be raised on an as-applied basis. Such commentary in no way implies that one who submits a license is limited to only bringing an as-applied challenge.

Brentwood, 474 F.3d 332 (6th Cir. 2007). *See* Brief in Opp., pp. 20-21. This opinion has now been vacated by the Sixth Circuit and replaced with an amended opinion that explicitly recognizes the ability of an applicant to facially challenge a prior restraint on speech. *Prime Media, Inc. v. City of Brentwood*, __ F.3d __, 2007 WL 1324951, at *6-7 (6th Cir. May 8, 2007) (citing *Lakewood*). While the court held that the sign applicant in *Brentwood* could not facially challenge the licensing scheme, such conclusion was dictated by the fact that the ordinance in question removed the licensing requirement altogether, allowing individuals to display signs without obtaining a permit. *Id.* at *7. The Sixth Circuit made it clear that in cases such as this one, where Granite State was required to first obtain a permit before posting a sign, a plaintiff can facially challenge the licensing scheme on the grounds that it conveys unbridled discretion in government officials. *Id.* at *6 (citing *G & V Lounge v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir. 1994)). Despite Respondent's assertions to the contrary, the divergence between the approach adopted by the Sixth Circuit and the Eleventh Circuit could not be more apparent.

Similarly, Respondent's attempt to distinguish *Peachlum v. City of York*, 333 F.3d 429 (3d Cir. 2003), by relying on *Service Employees Int'l Union v. Municipality of Mt. Lebanon*, 446 F.3d 419 (3d Cir. 2006), is undermined by the Third Circuit's recent opinion in *Riel v. City of Bradford*, __ F.3d __, 2007 WL 1288578 (3d Cir. May 3, 2007). In *Riel*, the Third Circuit permitted the plaintiffs to facially challenge numerous provisions of two ordinances that were never applied to them. *Id.* at *1-4. While the plaintiffs initially challenged the fact that they had been cited for displaying various signs without obtaining a permit, the city entered into a consent order staying prosecution of those citations and amended the ordinances in question. *Id.* at *1. Unsatisfied, the plaintiffs mounted a facial challenge to the amended ordinances, including the permitting requirement, even though the codes now allowed the plaintiffs to display

many of the proposed signs without a permit. *See Riel v. City of Bradford*, 2005 WL 2106554, at *20-23 (W.D. Pa. Aug. 31, 2005). Even though the district court and the Third Circuit found the amended ordinances to be constitutional, both courts afforded plaintiffs standing to facially challenge these ordinances even though they had never been "injured" under the amended ordinances. 2005 WL 2106554, at *20-23; 2007 WL 1288578, at *9-17. Thus, the contrast between the approaches of the Third and Eleventh Circuits is stark.

Moreover, the Eleventh Circuit's methodology of looking at the particular facts of a litigant's case in order to limit or constrain a facial challenge is inconsistent with the approach advocated by this Court. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10, 112 S. Ct. 2395, 2403 (1992) (holding "[f]acial attacks on the discretion granted a decisionmaker are not dependent on the facts"); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770, 108 S. Ct. 2138, 2151 (1988); *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S. Ct. 736, 742 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger"); *see also R.S.W.W.*, 397 F.3d at 436-37; *Southworth v. Board of Regents*, 307 F.3d 566, 574 (7th Cir. 2002). The Eleventh Circuit's abandonment of this well-established approach warrants review.

II. RESPONDENT'S ATTEMPT TO DIMINISH THE FIRST AMENDMENT IMPLICATIONS OF SIGN REGULATION IS UNPERSUASIVE.

In an attempt to persuade this Court that a facial challenge under the overbreadth doctrine should not be applicable in this instance, the City attempts to argue that because sign ordinances regulate structures instead of regulating the speech or conduct of an outdoor advertising plaintiff, the licensing schemes associated with sign ordinances should not be under the purview of the

overbreadth doctrine. *See* Brief in Opp., pp. 17-18. As this Court has often acknowledged, however, control of the medium of speech is tantamount to control of the speech itself. For example, the regulation of newsracks or cable television wires is subject to constitutional protections. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415, 113 S. Ct. 1505, 1509 (1993) (newsracks entitled to First Amendment protection as the "manner" in which speech is distributed); *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 214, 117 S. Ct. 1174, 1198 (1997) (recognizing regulations on cable television subject to First Amendment protections). Signs are, of course, an even more fundamental medium of speech. *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55, 114 S. Ct. 2038, 2045 (1994); *Metromedia v. City of San Diego*, 453 U.S. 490, 501, 101 S. Ct. 2882, 2889 (1981) ("Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages"). Thus, Respondent's suggestion that the regulation of signs does not sufficiently impact the First Amendment as to trigger the need for facial challenges under the overbreadth doctrine is without merit.

Equally as unpersuasive is Respondent's attempt to dismiss precedent from other circuit courts that addresses adult entertainment licensing schemes. *See* Brief in Opp., p. 18 n.2. As this Court noted in *Littleton*, "'[t]he core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech.'" 541 U.S. at 780, 124 S. Ct. at 2224. Thus, the question is not what type of First Amendment-protected business activity the courts are considering, but whether the business for which a license is required is protected by the First Amendment. *Id.* As this Court's decisions in *Ladue* and *Metromedia* illustrate, communicating via signs and billboards is protected by the First Amendment. Thus, this Court's precedents involving

other First Amendment-protected activities such as adult entertainment are applicable.

III. RESPONDENT'S INTERPRETATION OF THE OVERBREADTH DOCTRINE STRIPS THE DOCTRINE OF ANY BENEFIT TO SOCIETY.

As Granite State noted in its opening brief, this Court has long recognized that speech restrictions "must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma*, 413 U.S. 491, 611, 93 S. Ct. 2794, 2915 (1985). This Court has also noted that it "has altered its traditional rules of standing to permit – in the First Amendment area – 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated.'" Id. at 612, 93 S. Ct. at 2916 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121 (1965)). Therefore, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech." *Broadrick*, 413 U.S. at 612, 93 S. Ct. at 2916.

A primary reason the overbreadth doctrine was created was to encourage the evaluation and removal of unconstitutional speech restrictions where most of those regulated have little or no ability to assert a challenge. The overbreadth doctrine was developed "to enable persons who are themselves unharmed by the defect in a statute nevertheless to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, ***in other situations not before the Court***." *Board of Trustees v. Fox*, 492 U.S. 469, 484, 109 S. Ct. 3028, 3037 (1989) (emphasis added). The "other situations" to which the Court referred were the enforcement of provisions that infringed

upon the speech rights of third parties, but not necessarily the plaintiff's rights. By limiting a litigant's ability to bring an overbreadth claim to only provisions directly applied to that litigant, the social benefit of overbreadth is removed.

As this Court noted in *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839 (1984),

> Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake. *The crucial issues are whether Munson satisfies the requirement of "injury-in-fact," and whether it can be expected satisfactorily to frame the issues in the case.* If so, there is no reason that Munson need also be a charity.

467 U.S. at 956-58, 104 S. Ct. at 2846-48 (emphasis added). The recent decisions from the Eleventh Circuit, as evidenced by the *Ft. Lauderdale* decision at bar, threaten to remove all of the social benefits of the overbreadth doctrine.

Of course, such a limitation suits Respondent, because it enables municipalities to regulate communication via signs without being subject to a facial challenge. Respondent's invocation of this Court's "substantial social costs" warning regarding the over-application of the overbreadth doctrine further shows the lengths to which municipalities will go to defend unconstitutional ordinances.

In *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 2197 (2003), the Supreme Court warned that "there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally *unprotected* speech, or especially to constitutionally *unprotected* conduct." (emphasis added). However, as this

Court established in *Metromedia* and *Ladue* that signs are a constitutionally protected medium for speech, the warning from *Hicks* is inapplicable. What is applicable from *Hicks*, however, is this Court's statement that proper use of the overbreadth doctrine "reduces the[] social costs caused by the withholding of protected speech." Id. at 119, 123 S. Ct. at 2196. Thus, Granite State's invocation of the overbreadth doctrine was proper and the Eleventh Circuit's continual erosion of the doctrine should be re-evaluated.

IV. THE ELEVENTH CIRCUIT'S EN BANC *TANNER* DECISION DID NOT RESOLVE THE CIRCUIT'S DISPARATE OPINIONS ON THE ISSUE OF STANDING.

In an effort to portray cohesiveness in the Eleventh Circuit's overbreadth jurisprudence, the Respondent contends that "[o]n rehearing *en banc* the Eleventh Circuit upheld the district court's decision that Tanner lacked standing to challenge provisions of the ordinance that were not applicable to it." *See* Brief in Opp., p. 9. To the contrary, however, the Eleventh Circuit did not uphold the district court's decision, but rather explicitly dismissed the appeal as moot based on the county's passage of an amended sign ordinance. *Tanner Adver. Group, L.L.C. v. Fayette County*, 451 F.3d 777, 780 (11th Cir. 2006). The only discussion of standing was whether Tanner had standing to challenge the only provision of the former sign code that was preserved in the 2005 ordinance. *Id.* at 790-91. For Respondent to assert that the Eleventh Circuit's decision in *Ft. Lauderdale* is based on *Tanner* simply defies common sense. The court itself noted that it left that issue for another day as a result of mootness. 451 F.3d at 791. Rather than address standing in *Tanner*, the court issued four far-reaching *unpublished* decisions in the months thereafter.

Respondent *needs* to show continuity between *Tanner* and *Ft. Lauderdale* so that it can discount Granite State's

accurate conclusion that the Eleventh Circuit has decided the overbreadth issue *sub silentio* in the wake of *Tanner*, without actually issuing a decision on the merits. How else can Respondent explain the obvious differences between *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg*, 348 F.3d 1278 (11th Cir. 2003), where a litigant was allowed to facially challenge the licensing scheme, and the Eleventh Circuit's recent decisions in *Advantage Advertising, L.L.C. v. City of Hoover*, 2006 WL 2344957 (11th Cir. Aug. 11, 2006), and *Ft. Lauderdale*, among others, where litigants were denied the same opportunity? For this important issue to be decided *sub silentio* is a departure from the accepted course of judicial proceedings and warrants review by this Court.

CONCLUSION

This Court has consistently allowed a litigant to facially challenge a prior restraint on speech, even when the underlying use is prohibited. Most circuit courts concur. Thus, review of the Eleventh Circuit's aberrant holdings is needed. The Eleventh Circuit's systematic narrowing of overbreadth threatens the ability of First Amendment-protected businesses to bring facial challenges and thus defeats one of the primary purposes underlying the overbreadth doctrine: encouraging economically motivated parties to challenge speech restrictions for the benefit of those who are unlikely to bring suit.

Respectfully submitted,

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